IN THE CONSOLIDATED ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

IN RE NAFTA CHAPTER ELEVEN/UNCITRAL CATTLE CASES

THE CANADIAN CATTLEMEN FOR FAIR TRADE

Claimants/Investors

-and-

UNITED STATES OF AMERICA

Respondent/Party

CLAIMANTS/INVESTORS: THE CANADIAN CATTLEMEN FOR FAIR TRADE
REPLY MEMORIAL ON THE PRELIMINARY QUESTION

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I. Introduction

1. This case is about the failure of the United States to honour a fundamental obligation of NAFTA: national treatment. The United States has an obligation pursuant to NAFTA Article 1102(1) to grant the Claimants treatment no less favourable than the treatment accorded to its own investors operating in like circumstances in the North American Free Trade Area. The Claimants' collective investments have helped establish and foster exactly the kind of integrated market envisaged by the political officials who ushered the NAFTA into force, and as explicitly provided in the NAFTA text. Having failed to honour its national treatment obligation to the Claimant Investors, the Respondent now urges upon this Tribunal an untenable interpretation of the NAFTA text that would excuse the United States from paying the Claimants the compensation that is properly due.

2. The Parties have agreed to submit the following question to the Tribunal:

> Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants' investments at issue are located in the Canadian portion of the North America Free Trade Area and the Claimants do not seek to make, are not making and have not made investments in the territory of the United States of America?

3. The answer to the question is yes. The Tribunal has jurisdiction to proceed to a hearing of the merits of the consolidated claims, based on the applicable rules of international law. The Tribunal has jurisdiction because:

(a) the Claimants' interpretation of Article 1102(1) is fully supported by Article 31 of the Vienna Convention on the Law of Treaties ("VCLT") which provides that treaties are to be interpreted in accordance with their ordinary meaning, in context, and that such interpretation is to be guided by the object and purpose of the treaty.

(b) the terms of Article 1102(1), interpreted within their proper context and in light of the objectives and principles of the NAFTA set out in Article 102(1), are clear and unambiguous: the Claimants are entitled to the most favourable treatment accorded to their U.S.-based competitors by the Respondent without imposing any of the territorial limitations ascribed by the Respondent to them; and

(c) a review of the drafting history of the applicable NAFTA texts confirms the interpretation established by application of the approach set out in VCLT Article 31.

4. The Claimants submit that the Respondent's approach to treaty interpretation is flawed and its position is untenable because the Respondent:

(a) fails to adhere to the general approach to interpretation of NAFTA Articles 101(1), 1101(1) and 1102(1) required under VCLT Article 31 and customary international law;

(b) attempts to obscure the *sui generis* nature of this case;

(c) relies heavily on irrelevant jurisprudence and academic commentary;

(d) submits an inapplicable sovereignty principle to the interpretation of the NAFTA;

(e) makes erroneous claims about the alleged agreement of the Parties on interpretation of the NAFTA; and

(f) attempts to construct an unsustainable "legal scrub" theory that avoids the obvious import of the available preparatory texts of NAFTA Chapter 11.

5. In addition, the Respondent has ignored the facts setting out how and why the Claimants were entitled to rely, and did rely, on the promise of non-discrimination for their participation in the North American Free Trade Area. The investors participated in

an integrated continental market fostered through the establishment of the rule of law within the Free Trade Area established by the NAFTA.[1] Their market was subsequently disrupted by the imposition of a measure that was fundamentally at odds with the United States' obligation to promote competition and non-discrimination in the free trade area, contrary to Article 1102(1) of the North American Free Trade Area.

6. In sum, the ordinary meaning of the NAFTA terms at issue demonstrates why the Respondent is incorrect. The objectives and context within which these terms are situated also demonstrate why the Respondent is incorrect. NAFTA Article 1102(1) is not merely a bilateral investment treaty obligation. It is a NAFTA obligation that binds the United States to provide the Claimants non-discriminatory treatment vis-à-vis investors competing in like circumstances in the North American Free Trade Agreement. It imposes no territorial limitation as to where an investor must invest in order to qualify for protection vis-à-vis other investors. Nothing in the Chapter imposes such a territorial limitation on the Article 1102(1) obligation. Where the drafters intended for territorial limitations to exist in NAFTA Chapter 11, they explicitly included them, such as in Articles 1106 and 1110. Territorial limitations should not be read into the text where none exist, and particularly not when the objectives and context of the treaty support the opposite conclusion.

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[1] Indeed as early as the U.S.-Canada Free Trade Agreement, experts identified the importance of stability and certainty in the cross border trade relationship. Peter Morici, then Vice President, National Planning Association, assessing the importance of the agreement declared:

> From the point of view of trade policymaking, an effective bilateral trade agreement not only must eliminate tariffs and achieve compromises on federal and provincial procurement preferences, subsidies, product standards, intellectual property rights, and other non-tariff issues. It also must embody provisions assuring the free flow of goods and services is not hampered by administrative protection.

Peter Morici, "Impact on the United States", Edward R. Fried, Frank Stone & Philip H. Trezise, eds., *Building a Canadian-American Free Trade Area* (Washington, D.C.: The Brookings Institution, 1987) 44 at 67.

II. Summary of Applicable Facts

7. As acknowledged by the Respondent at p. 2 of its submission and elaborated in each of the Claimants' Notices of Arbitration, the Claimants are all Canadian nationals engaged in the beef and cattle business. These businesses include: feedlot operations and other cattle-related operations including cow-calf production, back-grounding, finishing, custom feeding, agency/brokerage as well as secondary transportation and crop production activities. The establishment of the North American Free Trade Area within which the continental market for live cattle, and the North American cattle herd, have grown was the intended result of the economic integration underlying the NAFTA. Each of the Claimants has made investments in this live cattle market and each has suffered serious economic losses as a result of the Respondent's measures, which continue to unfairly discriminate against Canadian participants in favour of their U.S. counterparts competing in the very same integrated market.

A. Discriminatory Measures

8. Effective May 20, 2003, the United States has maintained prohibitions and restrictions on Canadian-origin livestock and beef products. These U.S. measures have included:

(a) an absolute ban on the transport, shipment and sale of certain Canadian-origin livestock from May 20, 2003 to July 14, 2005;[2]

(b) an absolute ban on the transport, shipment and sale of certain Canadian-origin cattle 30 months of age and older;[3]

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[2] 68 Fed. Reg. 31,939 (May 29, 2003) (codified at 9 C.F.R. §§ 93-94). The ban was adopted by the Animal Plant and Health Inspection Service (APHIS), part of the United States Department of Agriculture (USDA), pursuant to its authority under a federal statute, the Animal Health Protection Act (AHPA), 7 U.S.C. § 8303.

[3] 9 C.F.R. § 93.436.

(c) an absolute ban on the transport and sale of all Canadian-origin pregnant heifers;[4]

(d) the implementation of a costly, onerous, and discriminatory certification process;[5] and

(e) a ban on the transportation and sale of bovine meat products derived from bovines 30 months of age and older in the United States.[6]

9. From May 20, 2003 to July 14, 2005, the United States imposed and maintained an absolute prohibition on the shipment of live cattle from Canada under the authority of the *Animal Health Protection Act* (AHPA).[7] This ban was imposed in spite of abundant evidence that Canadian-origin livestock and beef products were safe and posed minimal risk of BSE to the United States.

10. U.S. authorities commenced an unnecessary and lengthy rule-making process in May 2003 that supported a ban on shipments of livestock and certain beef products from the Canadian portion of the North American Free Trade Area to the American portion for 26 months. During that 26-month period, the Claimants suffered significant economic losses. Even when the *Animal and Plant Health Inspection Service* (APHIS) of the *United States Department of Agriculture* (USDA) determined that Canadian-origin livestock and beef products represented a minimal risk to the U.S. portion of the industry,[8] significant restrictions remained in place. These restrictions have been

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[4] 9 C.F.R. § 93.436(a)(1). This ban was contained in "technical amendments" published by APHIS on March 14, 2006 [71 Fed. Reg. 12,994 (Mar. 14, 2006)], but which, according to APHIS, simply "clarified" a ban that had already been in place since publication of the January 2005 Final Rule.

[5] *Ibid.* §§ 93.436(a)(3) and (b)(4).

[6] *Ibid.* §§ 93.401(a) and 94.18(b) and 94.19.

[7] 7 U.S.C. § 8303(a)(1).

[8] See Bovine Spongiform Encephalopathy; Minimal-Risk Regions and Importation of Commodities; Finding of No Significant Impact and Affirmation of Final Rule, 70 Fed. Reg. 18,252 and 18,257 (Apr. 8, 2005).

maintained in spite of the fact that U.S. authorities have recognized that Canadian authorities have the necessary safeguards already in place.

11. The rule-making process engendered additional frustration and delay by means of judicial action by protectionist industry members in the United States.[9]

12. Until the January 2005 Final Rule, politics had intervened to trump sound science, the *World Organization on Animal Health* ("OIE") guidelines for international trade, and the NAFTA. Even now, significant restrictions have remained in place for political reasons that have put the Claimants at a competitive disadvantage with their U.S. competitors and have added increased costs and delays to their operations. These include:

(a) a prohibition on the transport and sale of certain Canadian-origin livestock 30 months of age and over;

(b) a prohibition on the sale and transport of Canadian-origin pregnant heifers;

(c) costly certification procedures for live cattle under 30 months of age; and

(d) a ban on the transportation and sale of bovine meat products derived from bovines 30 months of age and older in the United States.[10]

13. These continuing prohibitions and restrictions were and are not justified. In the context of a fully integrated market, they make no sense. The Respondent's actions have consistently failed to account for the fact that Canadian- and U.S.-origin cattle have long since become intermingled and therefore form a single, North American herd.

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[9] See *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture.*, 359 F. Supp. 2d 1058 (D. Mont. 2005). The same judge had previously issued a temporary restraining order that blocked APHIS from issuing import permits for Canadian beef. *See Ranchers Cattlemen Action Legal Fund v. United States Department of Agriculture*, No. 04-CV-51, 2004 WL 1047837 (D. Mont. Apr. 26, 2004). See also *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. United States Department of Agriculture*, 415 F.3d 1078 (2005).

[10] See *supra*, notes 2 to 7.

14. During the period 1999 to 2003, 3.9 million live slaughter cattle and 1.1 million feeder cattle were sent from Canada to the United States. Over 150,000 slaughter cattle were sent from the United States to Canada.[11] In addition, large numbers of breeding cattle had moved in both directions across the border and Canada had maintained a steady trade in the exportation of dairy heifers.[12] In 2002 alone, well over 550,000 Canadian feeder cattle and calves had been exported to the United States and, given that the majority of these were exported late in 2002, it can be concluded that on May 20, 2003, there were over 200,000 live feeder and breeding cattle in U.S. herds and feedlots that had been born in Canada.[13] Simply put, only protectionists or the misinformed could speak of "Canadian" or "American" herds prior to imposition of the Respondent's ban and its subsequent modifications. There was one, North American herd.

15. It was not until January 4, 2007 that U.S. officials finally announced a *proposed* set of amendments to the January 2005 Final Rule.[14] If adopted, those amendments would purportedly re-open the Respondent's border to live cattle from Canada 30 months of age or older.[15] These proposed changes, however, have not yet come into effect. The basis for relaxing the restrictions on imports of Canadian cattle that continue to apply under the Final Rule – that Canadian regulations protecting against the introduction of BSE in the North American cattle herd are as sound as U.S. safeguards – was just as valid in May 2003 as it is in January 2007.

16. The continued ban on Canadian-origin cattle and beef products was never justified or reasonable in the circumstances. Those circumstances include:

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[11] CanFax statistics, online < http://www.canfax.ca/>.

[12] See generally Claimants' Notices of Arbitration at p. 26.

[13] CanFax, *supra* note 11.

[14] 72 Fed. Reg. 1102 (9 January, 2007).

[15] Cattle born after March 1999. See: News Release No. 0001.07, http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=true&contentid=2007/01/0001.xml, last viewed on 15 January 2007.

(a) the science of risk regulation;

(b) integration of the North American market for live cattle and beef products;

(c) regulatory homogeneity extant between Canadian and American regulatory regimes; and

(d) the compliance of Canada's regulations with the OIE international guidelines.[16]

B. The Integrated Cattle Market

17. The U.S. measures are not justified and are inconsistent with the Respondent's NAFTA obligation under Article 1102(1). They are not justified by science and are incongruous with the integrated Canada-U.S. market for live cattle. In the cattle and beef sector, the Canada-U.S. Free Trade Agreement (FTA) and the NAFTA have effectively eliminated borders in the cattle and beef sector as relevant from an economic or commercial perspective.

18. The Claimants represent over one quarter of Canada's portion of the North American cattle industry. As investors in the integrated market, they have actively engaged in growing their respective shares of the market by participating in the integration process. Their investment decisions were based upon an assumption that the Free Trade Area promised the opportunity for considerable growth, on a competitive basis, throughout the territories of each NAFTA Party. That process was premised upon the promise of unfettered access to suppliers and customers throughout the Free Trade Area. The Claimants operated in the context of the 1102(1) obligation that explicitly protected them against discriminatory measures by the United States.

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[16] OIE, *Standards on BSE: A Guide For Understanding And Proper Implementation*, January 2004, online < http://www.oie.int>.

19. Article 1102(1) must be construed in the context of the NAFTA regime that was built with the objective of market integration. This is clearly expressed by the expectation of U.S. Congress members when NAFTA was signed:

> Hemispheric trade integration will not be easy, and it may take many years to complete. But we must begin that process. We must commit ourselves to achieving the goal because the success of such an effort in my view will be critical to our future economic well-being.[17]

And also,

> In 1979 I introduced a legislation calling for a North American integrated market. [...]
>
> Now I see a tremendous momentum building in the direction of integrated markets in this hemisphere. In fact, practically the entire economic profession is in favor of NAFTA because it makes good economic sense for our country--period.[18]

20. Article 1102(1) is to be construed within the context of the NAFTA regime that was built with the objective of market integration. The U.S. Administration also understood the goal and consequences of the three North American countries entering into the NAFTA, describing the benefits of the Agreement to U.S. legislators in this manner:

> The North American Free Trade Agreement is the most comprehensive trade agreement ever negotiated and creates the world's largest integrated market for goods and services. [...] With NAFTA, the United States, Canada, and Mexico will create the biggest integrated market in the world--a combined economy of $6.5 trillion and 370 million people. NAFTA is the U.S. opportunity to respond to, and compete with, burgeoning trade alliances in Europe and Asia. By creating export opportunities, NAFTA will enable the United States to take advantage of U.S. economic strengths and remain the world's biggest and best exporter.[19]

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[17] U.S. *North American Free-Trade Agreement* Implementation, 103d Cong. (1993) at S16374 (Christopher J. Dodd, D-CT), online: Library of Congress < http://thomas.loc.gov>, last viewed January 22, 2007.

[18] U.S., *NAFTA*, 103d. Cong. (1993) at S15518 (Pete V. Domenici, (R-NM)), online: Library of Congress < http://thomas.loc.gov >, last viewed January 22, 2007.

[19] North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No.103-159, Vol. 1, 103d Cong., 1st Sess., at 194 (1993).

21. In a Report by the Clinton Administration to Congress in 1999, the intended market integration trend in the agricultural sector was specifically described as follows:

> The NAFTA in isolation has had a positive overall effect on U.S. agriculture, reinforcing the trend toward greater integration of the North American agricultural marketplace and a more productive and efficient American agricultural sector.[20]

22. It is widely recognized that the Canada-U.S. cattle market is integrated. Economic empirical analysis also demonstrates that, on a Canada-U.S. basis, industry members acted on the expectations arising from implementation of the NAFTA: i.e. that it was intended to create a free trade area within which the rule of law would govern against discriminatory measures that impeded integration or otherwise frustrated the establishment of a predictable commercial framework for business planning and investment.

23. There are a variety of economic techniques that can evaluate the extent of market integration for slaughter cattle in the Canadian-American portion of the North American Free Trade Area. For example, price correlation analysis reveals how closely two variables are related, such as the cattle industry as between key states and provinces, Cattle market prices, as displayed below in Figure I, demonstrate virtual harmony within the Free Trade Area in live cattle sales – until the day that the U.S. measures were imposed. Monthly slaughter steer prices for the key provincial and state prices (from 1985 through to 2005), set out in Figure I also reveal an impressive price correlation of 0.96 as between U.S. and Canadian prices through 2003.[21]

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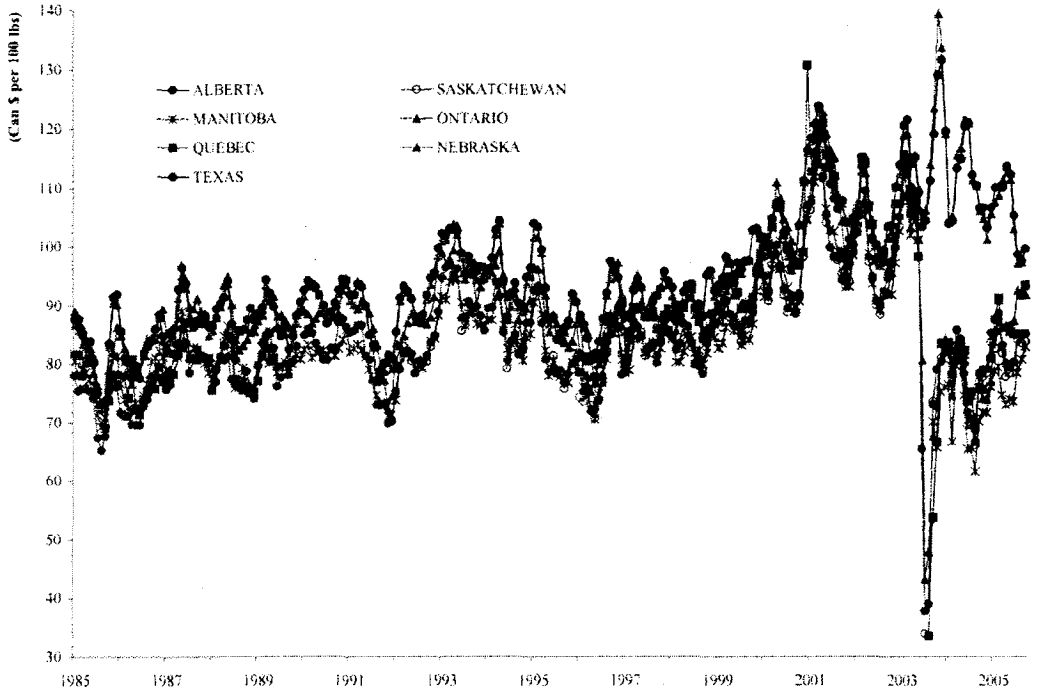
[20] USTR, *Study on the Operation and Effect of the North American Free Trade Agreement*, July 11, 1999, Chapter 2 (President William J. Clinton).

[21] Anindya Sen, *Estimating the Extent of Market Integration of Live Slaughter Cattle in North America: An Economic Analysis* (2007) at p. 3 [Sen Report].

Figure I - Canada vs. U.S. Slaughter Steers Price Comparison



24. Following the Respondent's arbitrary disruption of the North American market, however, this price correlation evaporated. Canadian cattlemen witnessed their sale prices plummet and U.S. cattlemen saw their sale prices concordantly soar. The price correlation is accordingly now measured at 0.12.[22] This evidence underlines how the market for slaughter cattle in Canada and the United States was integrated before the border closed in May 2003. It also underscores the impact of the disruption on this integrated North American market for live cattle.

25. Another approach is to examine cattle export flows between Canadian and American portions of the Free Trade Area. Intuitively, large export flows of live cattle across a political border would be indicative of an integrated market. Indeed, such large

[22] *Ibid* at p.4.

flows suggest that the border for economic purposes is not relevant. For the cattle industry, these large flows further suggest that investors in this industry operated their businesses without regard to the Canada-U.S. border prior to the Respondent's imposition of a border ban. One would hope for exactly this kind of integration in a region benefiting from the establishment and enforcement of a free trade area. The significant flows between Canadian and American industry members suggest that Canadian cattlemen were shipping their products to the location that best allowed them to maximise profit – based only upon distance from their facilities – rather than upon the nationality of the processor to which their products were sent.

26. Professor Anindya Sen outlines in his report the export of cattle across the Canada-U.S. border as a percentage of total trade including the cross border and interprovincial cattle flows. The analysis demonstrates that, on average, almost 50% percent of 2002 cattle shipments sent beyond an investor's home province flowed to industry members in the United States from industry members in Canada before the border closure.[23] The evidence suggests that an integrated market for cattle existed at least until the border actions by the United States.

27. Another economic approach would be to assess the degree of market integration through an analysis known as a gravity equation. Gravity analysis is commonly used by economists to assess the impact of the political border on the flow of trade in a commodity or service.

28. A Canadian economist, John McCallum, evaluates the export flow among Canadian provinces and compares it with the export flows across border, controlling for a variety of factors. What McCallum showed in his empirical research was that trade between provinces was 22 times greater than trade (export flows) between Canada and the United States (for all commodities).[24] McCallum's findings suggested that political

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[23] *Ibid.* at p. 7.

[24] John McCallum, "National Borders Matter: Canada-U.S. Regional Trade Patterns" (1995) 85 Am. Econ. Rev. 615.

borders between the two countries generally remained an important determinant of the trade flows.

29. The Sen Report employs the McCallum-type analysis specifically to the live cattle industry to see whether the empirical result would remain: poor market integration. In fact, the results from an examination of the cattle market yielded a much different result using the McCallum approach. The Sen Report demonstrates that shipments of live cattle between Canadian provinces was only 1.6 times greater than corresponding export trade flows of live cattle from Canada to the United States, controlling for other factors.[25] A significant contrast to the total commodity findings of John McCallum, the finding in the Sen Report strongly suggests that the market for live cattle was strongly integrated before the disruption at the border.

30. The empirical economic analysis using three separate methodologies has led Professor Sen to conclude, "My findings strongly suggest that the market for live cattle is indeed integrated for Canada and the United States, at least until the closure of the U.S. border to Canadian cattle exports in 2003."[26] Thus, prior to May 20, 2003, the political border between Canada and the United States had minimal impact upon the export flows of live cattle. After that day, one's location relative to the border arbitrarily determined economic success in a divided and malfunctioning continental market.

31. The economic analysis of the Canada-U.S. integrated market supports the position of the Claimants set out in the Notice of Arbitration. The Claimants submit that the logic of the NAFTA is clear and that the market integration is the objective. Investors must be protected against discrimination and unfair measures regardless of where the investment is located.

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[25] Sen Report, *supra* note 21.

[26] *Ibid.* at p. 13.

III. Applicable Law

A. Rules of Treaty Interpretation

32. The question before the Tribunal is whether it has jurisdiction to entertain a claim by the Claimants that NAFTA Article 1102(1) has been breached by the Respondent, given the location of their investment in the Free Trade Area.

33. The Tribunal is required, under NAFTA Article 1131(1), to decide this question in accordance with the NAFTA and the applicable rules of international law. NAFTA Article 102(2) further provides that NAFTA provisions shall be interpreted and applied in accordance with the applicable rules of international law and in light of the objectives of the NAFTA contained within Article 102(1).

34. Article 102(2) thus "provides a mandatory standard for the interpretation of the detailed provisions of NAFTA: 'The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.'"[27]

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[27] *United States – In the Matter of Cross-Border Trucking Service* (2001), USA-MEX-98-2008-01 at para. 218 [*Cross-Border Trucking*]. See also: *Meltaclad Corporation v. The United Mexican States*, ICSID/NAFTA Case No. ARB(AF)/97/1, Award at para.70 (30 August 2000) [*Meltaclad*].

35. A number of NAFTA Tribunals have thus far concluded that the term "applicable rules of international law," found in Article 102(2) and 1131(1), includes the customary international law rules of treaty interpretation.[28] Consensus has also been reached that the customary international law rules of treaty interpretation have been faithfully restated in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("VCLT").[29]

36. VCLT Article 31(1) memorialises the general rule of treaty interpretation, providing that:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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[28] See generally *Ethyl Corporation v. Canada*, UNCITRAL/NAFTA, Award on Jurisdiction at para. 50 (24 June 1998) [*Ethyl*]; *Canfor Corp. v. the United States of America and Tembec Corp. v. the United States of America*, UNCITRAL/NAFTA, Decision on Preliminary Question at para. 177 (6 June 2006) [*Softwood Lumber*]; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award at para. 43 (11 October 2002) [*Mondev*]; *Methanex Corporation v. United States*, UNCITRAL/NAFTA, Final Award, Part II, Chapter B at paras. 15-23, and Part IV, Chapter B at para. 29 [*Methanex*]; *United Parcel Service v. Canada*, UNCITRAL/NAFTA, Award on Jurisdiction at paras. 40-42 (22 November 2002) [*UPS*]; *Meltaclad* at para. 70, *supra* note 27; *Tariffs Applied by Canada to Certain U.S.-origin Agricultural Products* (1996), CDA-95-2008-01 at para. 119; *Grand River Enterprises et al v. United States of America*, ICSID/UNCITRAL, Jurisdictional Decision at para. 34 (20 June 2006) [*Grand River*]; and *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL/NAFTA, Arbitral Award at paras. 89-91 (26 January 2006).

[29] Vienna Convention on the Law of Treaties, May 23 1969, 1155 U.N.T.S. 331. The Tribunal is not obliged to follow the determinations of past tribunals in making any of its findings; as NAFTA Article 1136(1) confirms: awards issued by a tribunal "shall have no binding force except between the disputing parties and in respect of the particular case." Nonetheless, both in respect of the findings of other NAFTA tribunals, and those of other international adjudicatory bodies, their findings may prove helpful to the Tribunal in executing its interpretative role. See e.g.: *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award at para. 391 (14 July 2006) [*Azurix*]. See also Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford University Press 2003) pp. 602 ff.

(1) Ordinary Meaning and Object and Purpose

37. Under the general rule of interpretation, the text of the treaty is presumed to be the authentic expression of the parties' intentions. Statements by the parties, of their alleged intent behind a treaty provision, are neither relevant nor credible. The starting place for any exercise in interpretation must be the treaty text itself.[30]

38. The ordinary meaning of the text is generally ascertainable by the treaty interpreter and is normally conclusive of the obligations owed under a treaty. Such meaning is also informed by the context in which the subject text appears and the object and purpose of the treaty in question. As indicated by the International Court of Justice:

> The Court considers it necessary to say that the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.[31]

39. The object and purpose of a treaty provide interpreters with guidance as to how the ordinary meaning of its text should be interpreted in context. Neither a strict nor a liberal interpretation of treaty terms is appropriate.[32] Neither should interpretation favour the interests of claimants or respondents. The object and purpose of the treaty, as

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[30] *Suez, Sociedad General de Aguas de Barcelona S.A, and Interagua Servicios Integrales de Agua S.A and the Argentine Republic*, ICSID, ARB/03/17, Decision on Jurisdiction at paras 54-55 (16 May 2006). See also: *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction at para. 54 (3 August 2006); *National Grid PLC v. Argentina*, UNCITRAL/BIT Arbitration, Jurisdictional Decision at para. 80 (20 June 2006) [*National Grid*]; and *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany* (2002), WTO Doc. WT/DS213/AB/R and Corr.1 at paras 61-62.

[31] *Competence of the General Assembly For The Admission Of A State To The United Nations*, [1950] I.C.J. Rep. 4 at 8 (Advisory Opinion).

[32] *Siemens v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction at para. 81 (3 August 2004) [*Siemens*].

reflected by the terms in context, govern.[33] This is particularly so when such object and purpose is explicitly contained within the treaty itself.

40. NAFTA Article 102 explicitly delineates its object and purpose:

> 1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:
>
> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> (b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

41. NAFTA Tribunals have repeatedly applied the objectives found in Article 102(1) when interpreting substantive provisions of Chapter 11.[34] For example, the *Ethyl* Tribunal noted:

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[33] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award at para. 52 (12 October 2005) [*Noble Ventures*].

[34] See e.g. *Pope & Talbot v. Canada*, UNCITRAL/NAFTA, Awards on the merits phase 2 at para. 115 (10 April 2001) [*Pope & Talbot*]. See also: *UPS, supra* note 28 at para. 46, and *Cross-Border Trucking Service, supra* note 27 at para. 222.

> Given the relevance under Article 31(1) of the Vienna Convention of NAFTA's "object and purpose," it is necessary to take note of NAFTA Article 102, particularly its (1)(c) and (e) [...] The Tribunal reads Article 102(2) as specifying that the "object and purpose" of NAFTA within the meaning of those terms in Article 31(1) of the Vienna Convention are to be found by the Tribunal in Article 102(1), and confirming the applicability of Articles 31 and 32 of the Vienna Convention.[35]

42. Particularly relevant to this case are the NAFTA's objectives of: (1) promoting "conditions of fair competition in the free trade area;" (2) eliminating barriers to trade in goods and services between the territories of the Parties, thereby facilitating their cross-border movement; and (3) substantially increasing investment opportunities in the territories of the parties.

43. The fundamental reality of the NAFTA is that it created, and was indeed intended to create, a North American Free Trade Area. It does so with its very first provision: Article 101. In the very next provision, at Article 102(1)(b), it is specified that the purpose of the treaty is to "promote conditions of fair competition" in that Free Trade Area. Conditions of fair competition in the Free Trade Area are naturally manifested in, and promoted by, the elimination of barriers to goods and services across the Parties' borders (the objective outlined in subparagraph 1(a) of the provision); and substantially increasing investment opportunities among the territories of the three Parties (the objective outlined in subparagraph 1(c) of the provision).

44. In other words, objectives (a) and (c) represent both the means and the end sought by the NAFTA Parties: increasing the flow of goods, services and investment throughout the free trade area. Of necessity, establishment of the North American Free Trade Area must impact upon investment in the territories of all three Parties and eliminate trade barriers across their borders. Also of necessity, "conditions of fair competition" in the North American Free Trade Area are primarily promoted by the Parties' good faith adherence to all of the obligations found in the Agreement. The ordinary meaning of all

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[35] *Ethyl, supra* note 28 at para. 56.

three of these objectives is confirmed by the language of the preamble, demonstrating the purpose to which these objectives are intended.

45. Interpretation of the objectives found in Article 102(1) can also be informed by text of the NAFTA preamble.[36] Preambular text provides the context within which the specific terms of such a provision should be interpreted. Other tribunals have had recourse to preambular text, using it to ascertain the object and purpose of a treaty where explicit objectives were not included in its text.[37]

46. For example, the *S.D. Myers* Tribunal has opined:

> The NAFTA provides internal guidance for its interpretation in a number of provisions. In the context of a Chapter 11 dispute, it is appropriate to begin with the Preamble to the treaty, which asserts that the Parties are resolved, *inter alia*, to ... *Create an expanded and secure market for the goods and services produced in their countries... to ensure a predictable commercial framework for business planning and investment... and to do so in a manner consistent with environmental protection and conservation* [...][38] [emphasis in original].

And the Panel in *Cross-Border Trucking* has noted:

> The objectives develop the principal purpose of NAFTA, as proclaimed in its Preamble, wherein the Parties undertake, *inter alia*, to "create an expanded and secure market for the goods and services produced in their territories."[39]

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[36] VCLT Article 31(2) confirms that the preamble and annexes of a treaty are to be included in one's analysis of the context of treaty text.

[37] See e.g. *Siemens, supra* note 32 at para. 81; *Continental Casualty Company. v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Jurisdiction at para. 80, (22 February 2006); *Azurix, supra* note 29 at para. 307; and *SGS Société Générale de Surveillance v. Republic of the Philippines*, ICSID Case N° ARB/02/6, Jurisdiction at para. 116 (29 January 2004). See also: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc., WT/DS58/AB/R at para. 153 (Appellate Body Report).

[38] *S.D. Myers, Inc. and Canada*, UNCITRAL/NAFTA, Partial Award at para. 196 (13 November 2000).

[39] *Cross-Border Trucking, supra* note 27 at para. 219; citing: *In the Matter of Tariffs Applied by Canada to Certain United States Origin Agricultural Products*, CDA 95-2008-01, Final Panel at para. 122 (2 December 1996) [*Tariffs*].

47. Along with promises to "REDUCE distortions to trade" and "ESTABLISH clear and mutually advantageous rules governing their trade" the NAFTA Parties demonstrated in the preamble how the principles of non-discrimination and transparency are to inform establishment of the rule of law in the new Free Trade Area. More importantly, the resolution of the NAFTA Parties in the Preamble to "CREATE an expanded and secure market for the goods and services produced in their territories" informs of the significance of the Parties' establishment of a free trade area in Article 101. The North American Free Trade Area was established, obviously, to create an expanded and secure market.

48. The purpose of an expanded and secure North American market, fostered by the rule of law imposed under the NAFTA, was recalled in two other preambular resolutions: to "ENSURE a predictable commercial framework for business planning and investment" and to "ENHANCE the competitiveness of [North American] firms in global markets." Both of these resolutions focus on individual economic actors, providing them with the promise of stability and security for their commercial activities undertaken anywhere in the North American Free Trade Area.

49. These representations, made in respect of the individual economic actors who operate in the North American Free Trade Area, reinforce the legitimate expectation generated by the terms of NAFTA Articles 1102(1) and 1116(1) – which promise national treatment for "investors of another Party" and the right to seek compensation when such promise is broken. The expectation shared by all investors is that another NAFTA Party will not impose measures that accord more favourable treatment to their own investors "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" in the North American Free Trade Area.

(2) The Treaty Terms in Context

50. In considering how the remainder of NAFTA Chapter 11 provides context for interpretation of the terms of Article 1102(1), the Tribunal should adopt a construction that gives meaning to all of the terms, harmoniously.[40] This approach is in accord with the principle of effectiveness in treaty interpretation.

> The basic proposition of Article 31 is as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Panel must therefore commence with the identification of the plain and ordinary meaning of the words used. In doing so, the Panel will take into consideration the meaning actually to be attributed to words and phrases looking at the text as a whole, examining the context in which the words appear and considering them in the light of the object and purpose of the treaty.[41]

51. The "context" for interpretation of Article 1102(1) is primarily provided by the surrounding text of NAFTA Chapter 11. In particular, the following provisions should be considered in establishing context for interpretation of Article 1102(1):

- the definitions of "investor of a Party" and "investment" found in Article 1139;
- the claiming provisions, Articles 1116 and 1117;
- the "scope and coverage" provision, Article 1101;
- the remainder of the text of Article 1102; and
- the other substantive provisions of the Chapter (including Articles 1103, 1105, 1106 and 1110).

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[40] *Argentina – Safeguard Measures on Imports of Footwear* (2000), WTO Doc., WT/DS121/AB/R at para. 81 (Appellate Body Report). See also: *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products* (2000), WTO Doc., WT/DS98/AB/R at para. 81 (Appellate Body Report).

[41] *Tariffs*, *supra* note 39 at para. 120.

(i) The Treaty in Terms of Context of NAFTA Article 1139

52. The definition of "investor of a Party" is found in Article 1139. It states that an "investor of a Party [...] means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment." Also contained within Article 1139 is the definition of "investment," which includes "an enterprise" and "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." The Claimants are all nationals of Canada who have established enterprises and employed real estate and other property for the purpose of establishing, and participating in, an integrated North American market for live cattle.

(ii) The Treaty in Terms of Context of NAFTA Article 1116

53. NAFTA Article 1116 provides that "an investor of a Party" may submit a claim that "another Party" has breached a provision such as Article 1102(1) and that the investor has incurred loss or damage by reason or, arising out of, the breach.[42] All of the Investors' claims have been made under Article 1116, in respect of losses they have suffered arising out of the United States' discriminatory intervention in the North American cattle market in breach of Article 1102(1).

54. Article 1116 is a fundamental provision; without it investors would not be able to launch arbitrations in respect of NAFTA breaches that caused them harm. The provision thus offers an essential right to investors in the North American Free Trade Area. Apart from a three-year time limitation contained in paragraph (2), Article 1116 contains no restriction whatsoever on who may make a claim or in respect of what. The provision does not even mention the term "investment." One must rely on the fact that Article 1139 defines "investor of a Party" as one who "seeks to make, is making or has made an investment" to conclude that Article 1116 contemplates breaches of provisions other than those addressed directly to investors.

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[42] Article 1117 provides the same right to an investor to make a claim on behalf of an investment enterprise it has established under the laws of another Party.

(iii) The Treaty in Terms of Context of NAFTA Article 1101

55. Limitations upon the right to arbitration under Article 1116 are imposed under Article 1101 and in the text of the substantive provisions themselves. NAFTA Article 1101 provides that the chapter applies both to measures relating to "investors of another Party" and to "investments of investors of another Party in the territory of the Party." Contrary to the Respondent's contention, the terms of Article 1101 do not provide that the Chapter only applies to "investors of another Party" who have made investments in the territory of another NAFTA Party. Rather, the provision unambiguously reads:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

56. The provision establishes a structure for treatment of investors and investments throughout the Chapter, indicating when obligations protect investments, much like a simple bilateral investment treaty, and when they protect investors, consistent with the establishment of a Free Trade Area under Article 101. As described below, subparagraph (b) works in conjunction with Article 1116 and the text of each substantive provision to give NAFTA investors all of the protection normally found in a bilateral investment treaty. It does so by stipulating that the Chapter applies to measures affecting investments – but only those investments made in the territory of another NAFTA Party.

57. In contrast, subparagraph (a) works in conjunction with Articles 1102(1), 1103(1) and 1116 to provide NAFTA investors with greater protections against non-discrimination than would be found in any of the Respondent's bilateral investment treaties. None of these bilateral investment treaties ever purported to establish the world's largest free trade area, implicitly or otherwise. The leaders responsible for the

NAFTA did. None of these bilateral treaties contain text establishing a geographically contiguous Free Trade Area as between their territories; the NAFTA does.

(iv) The Treaty in Terms of Context of Other NAFTA Articles

58. The traditional protections offered by a bilateral investment treaty are well known: freedom from unjustified discrimination; treatment in accordance with the customary international law minimum standard of treatment for aliens; full, fair and effective compensation for expropriation; freedom from performance requirements imposed by host States; and freedom from nationality restrictions imposed by a host State in respect of share capital ownership. Using careful drafting, NAFTA Chapter 11 contains all of these protections.

59. For example, NAFTA Articles 1106 (regarding performance requirements) and 1110 (regarding expropriation) both explicitly impose a territoriality requirement on covered investments. An investor who is seeking to make an investment that is subject to an unlawful performance requirement, or who has made an investment that has been expropriated without payment of compensation, can only make a claim under Chapter 11 if the protected "investment" has been made "in the territory of another NAFTA Party."

60. Similarly, NAFTA Article 1107 offers the traditional type of investment treaty protection to investors in respect of measures mandating nationality requirements on management positions and boards of directors. It only does so, however, in respect of measures applied by a Party to investment enterprises established under its laws by the investor of another Party.

61. NAFTA Article 1105 does not provide any direct benefit to investors, indicating that its protections apply only to investments. Because Article 1101(1)(b) indicates that the Chapter applies to investments in the territory of another NAFTA Party, it is obvious that Article 1105 cannot be claimed by an investor who has not made an investment outside of its own portion of the North American Free Trade Area. The three NAFTA Parties have affirmed this state of affairs by issuing an interpretative statement on July

31, 2001 that provides that the terms of Article 1105 were intended to embody the customary international law minimum standard of treatment of aliens.

(v) Symmetry in Chapter 11's National Treatment and the MFN Provisions

62. By contrast to all of these other provisions, NAFTA Articles 1102 and 1103 constitute hybrid provisions that, particularly when read in context with Article 1101(1) and in light of the NAFTA's objectives and interpretative principles, go further than merely providing the traditional forms of protection for cross-border investment. On their face, paragraph (1) of both provisions provides protection for the rights and interests of NAFTA investors themselves, wherever their investment has been made in the Free Trade Area. Such protection is based upon a comparison of investors whose circumstances of competition are "like" in that they participate in the kind of integrated continental market envisaged for the Free Trade Area. This protection is also based upon the practical impact of treatment received, rather than the mere presence of discriminatory intent.[43]

63. In other words, NAFTA Articles 1102(1), and 1103(1) provide investors with a right to treatment from another NAFTA Party that is no less favourable than it grants to its own investors, where such investors compete in the "like circumstances" of an integrated, continental market. As noted by the *Pope & Talbot* Tribunal, by their very nature "circumstances" are context dependent and have no absolute meaning across the spectrum of fact situations.[44] The circumstances of the present case are *sui generis*. Never before has a global claim been launched by such a large segment of any industry, or in respect of governmental discrimination that destroys the conditions of competition existing in one of the completely-integrated markets that were envisaged for the Free Trade Area.

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[43] *S.D. Myers, supra* note 38 at para. 254.

[44] *Pope & Talbot, supra* note 34 at para. 75.

64. Prior to May 23, 2003, the Claimant Investors competed in a continental market that – because of economic integration promoted within the North American Free Trade Area – knew no borders from an economic perspective. These are the circumstances in which they invested and maintained their businesses, in competition with U.S.- and other Canadian-based competitors from across the Free Trade Area. The Respondent's measures arbitrarily defined winners and losers in this continental industry on *de facto* national lines – contrary to the national treatment principle – radically altering the circumstances in which North American cattlemen operated.

65. The NAFTA was designed to promote conditions of fair competition in the Free Trade Area it established, based upon the cornerstone principles of national treatment and most favoured nation treatment enshrined in Article 102(1). The structure of NAFTA Article 1101(1), Articles 1102(1) and 1103(1) ensures that when investors such as the North American cattlemen are harmed by a discriminatory measure, they have a remedy.

66. To be clear, Articles 1102(1) and 1103(1) are both worded in a manner that specifically protects investors, separate and apart from their investments. They also provide for the protection of investments, however, in paragraph (2). Neither paragraph indicates that the investment to be protected must be made in the territory of another NAFTA Party, but there is no need. By operation of Article 1101(1)(b), the investments protected under Articles 1102(2) and 1103(2) must have been made in, or contemplated for, the territory of another NAFTA Party. Article 1101(1)(b) imposes the territorial requirement for these provisions, just as it does for Article 1105.

67. In contrast, Articles 1101(1)(a), 1102(1) and 1103(1) demonstrate perfect symmetry in respect of the protection of investors, as investors. Article 1101(1)(a) indicates that the Chapter extends to protection of investors. Articles 1102(1) and 1103(1) stipulate that such protection will be available to investors for national treatment and most favoured nation treatment breaches.

68. If the Respondent were correct, and it was impossible for the Claimants to receive protection for their investments in the North American Free Trade Area, there would be no need for paragraph (1). Articles 1102(2) and 1116 already allow an investor to claim for loss or damage arising from the way its investment in the territory of another NAFTA Party has been treated. Paragraph (1) of Article 1102 must have a meaning independent of paragraph (2). The Respondent's argument would render the terms of both paragraph (1) and Article 1101(1)(a) inutile.

69. In accordance with the principle of effective interpretation, it is submitted that Article 1102(1) can only be construed so as to protect investors of a Party whose competitors in the Free Trade Area have received more favourable treatment – contrary to the NAFTA's promise of fair competition in an integrated continental market. This is the only interpretation of the treaty text that comports with the explicit object and purpose of the NAFTA. This is also why, as described below, the Respondent virtually ignores the explicit objectives of the NAFTA in favour of generic objectives it claims apply in respect of all bilateral investment protection treaties.

(3) *Travaux Préparatoires*

70. A secondary approach to interpretation is also sanctioned under customary international law, but only where application of the general rule fails. This ancillary approach, which involves recourse to the preparatory texts of a treaty, as well as contemporaneous statements and actions attributable to treaty parties, should only be used where the ordinary meaning of the treaty terms, in context and in light of the treaty's objectives, lead to an absurd result. "Absurd" does not mean an interpretative result that is unpalatable to one of the disputing parties. This ancillary approach, found in VCLT Article 32, applies only in cases where the general interpretative approach leads to a result that is bizarre or incongruous in context.[45]

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[45] See e.g. *Grand River*, *supra* note 28 at para. 35; and *Tariffs*, *supra* note 39 at para. 121. See generally Brownlie, *supra* note 29.

71. Neither result proffered by the parties in this case is absurd. One is correct and the other is not, but neither is absurd. Accordingly, the ancillary interpretative approach outlined in VCLT Article 32 need not be applied by the Tribunal.

72. Moreover the NAFTA Parties did not issue official *travaux préparatoires*. After much controversy and debate, and a disclosure order issued by the *Softwood Lumber* Tribunal in July 2004, the three NAFTA Parties jointly released what they claimed to be all of the known drafts of the NAFTA negotiating texts. Accordingly, for the first time since their creation – between December 1991 and April 1993 – forty-two versions of the NAFTA negotiating text were finally made public.[46] Tribunals have been cautious to read too much into the availability of such informal *travaux*. For example, in discussing arguments concerning potential recourse to these texts in respect of the interpretation of NAFTA Article 1105(1), the *Methanex* Tribunal wrote:

> [...] the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.[47]

73. Nonetheless, the *Methanex* Tribunal did recognise that draft negotiating texts could serve the limited function of confirming the meaning of treaty terms derived from application of the general approach to interpretation recalled in VCLT Article 31.[48] A similar conclusion was reached by the ICSID Tribunal in *Noble Ventures*.[49]

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[46] All of which are available online <http://www.naftaclaims.com/commission.htm>.

[47] *Methanex*, Part II, Chapter B, *supra* note 28 at para. 22.

[48] See also *Ibid.*, Part II - Chapter H - Page 9 at para. 19; *European Communities – Customs Classification of Certain Computer Equipment* (1998), WTO Doc., WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R at para. 86 (Appellate Body Report).

[49] *Noble Ventures*, *supra* note 33 at para. 50.

(i) The Drafting History of Article 1101

74. Article 1101 sets the parameters for recourse to NAFTA Chapter 11's substantive provisions under Articles 1116 and 1117. The earliest versions of Article 1101, which was designated as Article 2101 until the draft of August 31, 1992, qualified application of the chapter to individual economic actors by requiring them to have made an investment in the territory of another Party. The December 1991 draft also indicated an early approach to these individual economic actors included "investors, service providers, or other persons of any other Party" [50] rather than only "investors of a Party." There was also no indication of the investor/investment architecture that demarcates the final version of the provision. The December 1991 draft provided as follows:

> Article 2101: Scope and Coverage
>
> Article XX12: Coverage and Post-termination coverage
>
> "This Chapter shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter""
>
> Article 401
>
> 1. This part shall apply to any measure of a Party affecting investors, service providers, or other persons of any other Party in respect of:
>
> (a) the establishment;
>
> (b) the acquisition;
>
> (c) the conduct and operation; or
>
> (d) the sale of business enterprises in or into its territory.

[50] Draft NAFTA, Investment Chapter, (December 1991).

75. By May 22, 1992,[51] the draft provision was broken into two distinguishable components – a paragraph on investor protection and a paragraph on investment protection. It provided:

> 1. **USA** [Unless otherwise provided,] this Chapter shall apply to measures affecting:
>
> (a) investments (of investors of a Party) in the territory of another party existing at the time of entry into force as well as to investments made or acquired thereafter; **MEX USA**[and
>
> (b) investors of a Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in the territory of another Party.]

76. Then, on August 26, 1992,[52] paragraph (b) was redrafted to include nothing more than "investors of another NAFTA Party." The import of removing a territorial requirement from the "investor" portion of what would become Article 1101(1)(b) is obvious; it demonstrates how individual economic actors, who would eventually be defined as "investors of a Party," were intended by the drafters (at least since the May 22, 1992 draft) to receive protection under the national treatment and most favoured nation treatment provisions in their own right as investors. Leaving a territorial qualification for investments also demonstrated intent to ensure that the chapter would provide all of the traditional protections for investments found in most bilateral investment treaties.

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[51] Draft NAFTA, Invest.522, Washington Composite (22 May 1992).

[52] Draft NAFTA, Invest.826, *Article 2101*, Lawyers' Revision (26 August 1992).

(ii) The Drafting History of Article 1102

77. In respect of national treatment language of Chapter 11, the three NAFTA Parties originally sponsored different versions of the provision in their negotiating drafts. For example, in the January 16, 1992, draft[53] the Canadian version appeared as follows:

> CDA [Article 105: National Treatment
>
> 1. Each Party shall accord to the goods, services and service providers, investors and suppliers of the other Parties treatment no less favourable than that accorded to its own like goods, services and service providers, investors and suppliers in respect of all matters covered by this Agreement, except as otherwise provided in this Agreement.]

78. Compare to the United States' version that appeared in the February 21, 1992 draft:

> USA [Article XXO1: Establishment and Treatment of Investment
>
> 1. Each Party shall accord nondiscriminatory treatment to an investor of another Party in the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory, including business enterprise controlled by such investor][54]

79. Other minor adjustments were made to the proposed text of Article 2103 during the drafting sessions before the draft of August 26, 1992, where a major change was introduced: the territorial requirement for investors was removed. The draft language at that time read:

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[53] Draft NAFTA, Invest.116, Georgetown Composite (16 January 1992).

[54] Draft NAFTA, Invest.221, Dallas Composite at p. 6 (21 February 1992).

Article 2103: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that which it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that which it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded by such state or province in like circumstances to investors, and their investments, of the Party of which it forms a part.

4. For greater certainty, no Party shall:

   a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the Party's territory be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

   b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment.[55]

80. The final change to the language of what would become NAFTA Article 1102 was made two drafts (and four days) later, on August 30, 1992,[56] where "in the territory of the Party" was added to subparagraph (b) of paragraph 4. There would be another 20 versions of the negotiating draft, generated from August 31, 1992 to April 23, 1993,[57] but no more changes were made to Article 1102(1).

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[55] *Supra* note 52 at section "Treatment of Investors and Investments".

[56] Draft NAFTA, Invest.830, Lawyers' Revision at p. 2 (30 August 1992).

[57] See *supra* note 46.

(iii) What the Final Additions to Articles 1101(1) and 1102(1) Indicate

81. This review of the rolling changes to the negotiating text of the national treatment provision demonstrates that the negotiators certainly entertained different options for the structure and content of the national treatment provision, as well as the scope and application of the Chapter. The August 26, 1992 change was obviously not insignificant and it was not accidental. If it were, the text of paragraph (1) would have been corrected four days later, on August 30, 1992, when a territorial restriction was returned to paragraph 4(b). The rolling text of the Chapter thus demonstrates that the omission of a territorial restriction from paragraph (1) was deliberate.

82. The Claimants submit that the significance of these changes in the NAFTA negotiating text confirm the ordinary meaning of the terms of Articles 1101(1) and 1102(1), understood in their context and in light of the objectives of the NAFTA.

B. The Respondent's Approach

83. The Respondent's interpretative approach fails to address the applicable customary international law approach on interpretation, with a focus instead on manufacturing a generic object and purpose for NAFTA Chapter 11 that would be consistent with the meaning it wishes to ascribe to the terms of Article 1102(1) – the ordinary meaning of its terms notwithstanding.

84. Despite the overwhelming consensus of NAFTA and other international tribunals concerning the importance of the customary approach to treaty interpretation recalled in VCLT Article 31, the Respondent provides little more than a cursory reference to VCLT Article 31 on page 6 of its Memorial, followed by brief mention of only one of the objectives contained within Article 102(1) on page 7. The brevity with which the Respondent sets out the applicable general rule of interpretation and rapidly passes over what it views as the entirety of the NAFTA's objectives belies the nature of its case. Rather than focusing on the actual terms of Articles 1101(1)(a) and 1102(1) in context

and in light of all of the objectives of the NAFTA, the Respondent simply refers to unrelated NAFTA cases[58] and notes what it considers to be favourable excerpts from official statements made by Canada and the United States in passing NAFTA implementing legislation.

85. The Respondent's approach is understandable, however. Faced with the ordinary meaning of the objectives to which it agreed in 1994 becoming the foundation of a classical national treatment case, the United States has been presented with two choices. It could either argue that objectives found in Article 102(1) do not apply to a Chapter 11 arbitration at all, or it could ignore their ordinary meaning and suggest an alternative, albeit not based upon the NAFTA text.

86. The Respondent attempted to employ the former approach in the *Softwood Lumber* case, claiming that Article 102(1) was only intended to apply to interpretation of the treaty's obligations by the three NAFTA Parties themselves – not a Chapter 11 tribunal. The likely reason that the United States now attempts the latter route is because the *Softwood Lumber* Tribunal did not accept the former argument, saying that it was not "[...] relevant in light of Article 1131(1) which requires a Chapter Eleven tribunal to 'decide the issues in dispute in accordance with *this Agreement* and applicable rules of international law'."[59]

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[58] Respondent's Memorial, page 8. The Respondent notes Canada's argument in the *Myers* case that an investor claiming in respect of its investment in Canada should not be entitled to damages it sustained in the United States related to the alleged breach. The Respondent fails to mention that Canada's argument was completely rejected by the Tribunal, or to acknowledge that the case involved a traditional claim for protection of an investment under Articles 1102(2), 1105(1) and 1110. Respondent also cites Mexico's arguments in the pending *Baview Irrigation District* case, where the Investors have made the untenable claim – albeit in the alternative – that NAFTA Article 1105 protects investments made by an investor in its own territory. The Investors in that case have also made some rudimentary arguments in respect of the application of Article 1102(1) to them as investors, while simultaneously making a more traditional argument in respect of their investments under Article 1102(2). The *Bayview* case does not involve the allegation that a NAFTA Party's measures have suddenly and irreparably disrupted the functioning of an integrated continental marketplace with the effect of favouring similarly-situated investors in favour of the claimants. Rather, it involves an allegation that Texas border famrers are entitled to rights to water captured for use in Mexico that was allegedly subject to an international allocation agreement between Mexico and the United States.

[59] *Softwood Lumber*, *supra* note 28 at para. 181 [emphasis in original text].

87. The *Softwood Lumber* Tribunal might also have added that the United States' argument stood in stark contrast to the principle of good faith. By operation of the principle of good faith, the United States is obliged to adhere an interpretation of the NAFTA's obligations that is in accord with its clearly-delineated objectives. Neither the Respondent nor the other NAFTA Parties have the discretion to interpret and apply the provisions of the NAFTA as they see fit. Interpretation must be informed by the NAFTA's specifically-delineated objectives.

88. The United States makes no reference to representations it made with Canada and Mexico in the NAFTA preamble. It makes no reference to any of the relevant objectives contained in Article 102(1), apart from mischaracterising the plural nature of the objective found in paragraph (c), to increase substantially investment opportunities in the territories of the Parties.[60] It also makes no mention of the interpretative rules and principles of the NAFTA, set out in Article 102(1), especially national treatment. And finally, the Respondent ignores the fact that Article 101 establishes a Free Trade Area whose regime of rules, and continuous territory, promising NAFTA investors what the preamble refers to as "a predictable commercial framework for business planning and investment."

89. Instead, from pages 7 to 11 of its Memorial the Respondent develops a generic "object and purpose" that it claims should be applied to NAFTA Chapter 11, which it derives not from NAFTA itself, but from other bilateral investment protection or trade treaty. Despite the widely-acknowledged understanding of the NAFTA as being a harbinger of continental regulatory cooperation and economic integration, and the text of the text itself, the Respondent portrays the NAFTA as being no more than a pedestrian trade treaty, albeit with a separate bilateral investment treaty attached.

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[60] As noted above, this reference to promoting investments in "the territories of the NAFTA Parties" should be contrasted to subparagraph (d), which refers to protection and enforcement of intellectual property rights "in each Party's territory".

90. In the process of fashioning its own generic object and purpose for NAFTA Chapter 11, the Respondent also adopts the quintessential 'all or nothing' approach to interpretation. In its view, NAFTA Chapter 11 can only be intended to protect foreign investment, as do bilateral investment treaties. The Respondent fails to consider the obvious, that the investment obligation contained within the world's most significant free trade agreement was built both to offer the kind of protection available to foreign investment under a typical bilateral investment protection and to provide investors with protection from discriminatory measures that unjustifiably provide more favourable treatment to their competitors operating in like circumstances in the North American Free Trade Area.

91. In other words, the Respondent does not recognise the ordinary meaning of the entire text of Article 102(1), or its preambular context. It chooses instead to selectively interpret Article 1102(1) in order to equate it with a bilateral investment treaty obligation designed only to protect cross-border investment. This approach ignores the entirety of the objectives explicitly provided in NAFTA Article 102(1), as well as the principles mandated by that provision to be used in their elaboration: national treatment, most favoured nation treatment and transparency.

92. For example, at p. 7 of its Memorial, the Respondent focuses exclusively on one of the objectives contained in NAFTA Article 102(1) and only in the abstract, failing to acknowledge the applicable preambular text and the principles of national treatment or MFN treatment. The objective to which the Respondent's analysis is restricted is "substantially increasing investment opportunities in the territories of the Parties" and in this regard the Respondent has mischaracterised it. The Respondent contends that the only utility of this objective is in demonstrating that an investor is only entitled to benefit from enhanced opportunities to invest in the territory of another NAFTA Party. Its argument is not supported, however, by the surrounding text.

93. When the drafters intended to restrict an obligation to measures affecting investments in the territory of another NAFTA Party, they said so. Article 102(1)(c) refers to increasing investment in the "territories of the Parties." By contrast, subparagraph (d) refers to protecting and enforcing intellectual property rights – which are a specific kind of investment set out in Article 1138 – "in each Parties' territory." Whereas the former objective refers to improving investment opportunities in the territories of the Parties globally, the latter provision refers to protecting a particular kind of investment in the territories of the Parties respectively. The ordinary meaning of the NAFTA text simply does not support the Respondent's position.

94. The Respondent's approach fails to take into account that NAFTA Articles 101 and 102(1) establish a Free Trade Area in which conditions of fair competition are promoted by the Parties' adherence to trade and investment obligations that govern all manner of governmental measures affecting all manner of economic activity in that Free Trade Area. It does so in spite of the fact that these objectives clearly contemplated substantial increases in both trade and investment throughout the Free Trade Area as a result, and that they were to be premised upon the over-arching principles of non-discrimination and transparency set out in the provision to inform their interpretation.

95. In addition, there are obvious flaws in the Respondent's general approach to interpretation:

(a) it fundamentally fails to adhere to the general rule applicable under VCLT Article 31 and customary international law;

(b) it attempts to recast this dispute as unremarkable and already settled by previous tribunals, rather than as the *sui generis* matter it actually represents;

(c) it attempts to apply irrelevant ICSID jurisprudence despite its obvious inapplicability to this case;

(d) it asserts a sovereignty principle inapplicable to the interpretation of the NAFTA;

(e) it makes erroneous claims about whether the Parties have agreed on interpretation of the provisions at issue; and

(f) it effectively manufactures a "legal scrub" exception out of whole cloth that it awkwardly attempts to apply in anticipation of the Claimants' arguments on the NAFTA's draft negotiating texts.

(1) Derivation from the VCLT Article 31 Approach

96. In authoring its own generic object and purposes for NAFTA Chapter 11, the Respondent relies heavily on the text and jurisprudence of bilateral treaties other than the NAFTA. It does so in obvious ignorance of the differences that exist between the NAFTA and other these various other treaties.

97. Faced with a similar line of argument from the Claimant in that case, the *Methanex* Tribunal took pains to explain that while principles and lessons can sometimes be drawn from different treaty texts and the decisions of other international tribunals, such an exercise should never divert the treaty interpreter from adhering to the general rule of interpretation:

> [...] the [treaty] term is not to be examined in isolation or in abstracto, but in the context of the treaty and in the light of its object and purpose. One result of this [...] general principle, being relevant to Methanex's first argument on GATT jurisprudence and Article 1102 NAFTA, is that, as noted by the International Tribunal for the Law of the Sea in *The MOX Plant case* (as also applied in *The OSPAR case*): "the application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard, to, inter alia, differences in the respective contexts, objects and purposes, subsequent practice of parties and travaux préparatoires."[61]

98. In fact, in the *Methanex* case, the United States actually argued that the Claimant's attempt to treat WTO and GATT rules and jurisprudence as directly applicable to NAFTA dispute settlement was unfounded "[...] given the significant differences between the relevant texts and the objects and purposes of the different treaties."[62] The Respondent cannot have it both ways. Those same significant differences render the Respondent's arguments in this case as meaningless as they did the claimant's arguments in the *Methanex* case – particularly because the Respondent's reliance upon other treaties comes at the expense of an appropriate focus on the text of the NAFTA preamble and Articles 101 and 102.

99. The Respondent also notes on page 16 of its Memorial how its bilateral investment treaties and its bilateral free trade agreements generally define the term "investment" as being restricted to economic activities undertaken by the investor of one Party in the territory of the other Party. The Respondent does not admit the obvious – that the terms to which it may have agreed in other treaties are not relevant to the Tribunal's analysis of ordinary meaning of the terms to which it agreed in another treaty, in context and in light of the other treaty's objectives.

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[61] *Methanex*, Part II, Chapter B, *supra* note 28 at para. 16 citing *The MOX Plant case (Ireland v. United Kingdom), Order on Provisional Measures*, 3rd December 2001, para. 51, 41 ILM 405, 413, quoted in *Access to Information under Article 9 of the OSPAR Convention (Ireland v. United Kingdom)*, para. 141, 42 ILM 1118, 1144. See also *ibid.* at paras. 25-37.

[62] *Ibid.* page 3 at para. 6 where the Tribunal refers to the Amended Statement of Defense at para. 304.

100. Furthermore, on page 16 of its Memorial, the Respondent notes that the Canada-United States Free Trade Agreement confined its "scope and coverage" provision to "any measure of a Party affecting investment within or into its territory by an investor of the other Party." The Canada-United States Free Trade Agreement was executed years before its successor, the NAFTA, whose own "scope and coverage" provision went through numerous iterations before the Parties settled upon one that did not include the kind of limitation found in the 1989 Agreement between Canada and the United States.

101. Moreover, as the *Softwood Lumber* Tribunal noted:

> With respect to Canfor and Terminal's reliance on Article 102(1)(c), the NAFTA establishes a free trade area among Canada, Mexico and the United States. The tribunal does not doubt that a free trade agreement will be enhanced if investment opportunities are increased. The architects of the NAFTA appear to have been aware of the advantages of such an integrated approach as evidenced by the Preamble and by including a Chapter Eleven concerning investments, although they did so with some hesitation by inserting Article 1112(1) relating to inconsistencies. In that respect, the NAFTA constituted a step forward in comparison with the Canada-United States Free Trade Agreement of 1989, which did not contain an investment disputes chapter.[63]

102. Accordingly, by making reference to the scope and coverage provision of its 1989 Agreement with Canada, the Respondent not only fails to demonstrate how adding an implicit territorial restriction to the text of Article 1102(1) is justified; it demonstrates why such an interpretation should fail. The NAFTA is a successor agreement to the 1989 Canada-United States Agreement. Whereas the 1989 Agreement with Canada provided far less protection to investors – in terms of recourse to arbitration – than most of the Respondent's bilateral investment treaties, the NAFTA provided more protection than any mere bilateral investment treaty. As one would expect of a successor agreement, the

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[63] *Softwood Lumber*, *supra* note 28 at para. 234 cited without footnotes from original text. The Tribunal subsequently concluded that this finding did not affect the result – as the case turned on resolution of a dispute settlement exclusion provision that was informed by a different NAFTA objective, Article 102(1)(e), respecting effective dispute settlement.

NAFTA promised a level of substantive protection from discrimination within the Free Trade Area that had simply not been found in the predecessor.

103. To be clear, the NAFTA preamble and its explicit objectives should never be used override or supersede the treaty text itself.[64] Rather, treaty terms must be read in light of the object and purpose of the NAFTA, as established by the terms of NAFTA Article 102(1) and understood within the context of the representations found in the NAFTA preamble. Neither, however, should the explicit objectives of a treaty be ignored nor usurped by recourse to those divined from other treaties.

> The fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.[65]

(2) Ignoring the *sui generis* Character of this Case

104. Throughout its Memorial, the Respondent also attempts to recast the issue before this Tribunal as being common and well-settled by other tribunals. In fact, this case and the issue before the Tribunal are *sui generis*. Never before has a large segment of an industry banded together to protect their interests as NAFTA investors in the promise of non-discriminatory participation in an integrated, continental market based upon the Free Trade Area that the Agreement established. There are no other NAFTA cases where the investors restricted their claims to protection under the "investor" provisions of the Chapter, rather than any of its conventional investment protection provisions; and there are no other NAFTA cases where the circumstances alleged as between comparable investors are based upon their participation in a fully-integrated market fostered by the establishment of the North American Free Trade Area.

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[64] *ADF Group Inc. and the United States of America*, ICSID, Case No. ARB(AF)/00/1, Award at para. 147 (9 January 2003). See also *Softwood Lumber*, *supra* note 28 at para. 179.

[65] *EC Measures Concerning Meat and Meat Products (Hormones)* (1998), WTO Doc., WT/DS26/AB/R, WT/DS48/AB/R, I, 135 at para. 181.

105. Indeed, the WTO dispute settlement context, where the same customary rules of treaty interpretation are applied as in the NAFTA, a panel was criticised by the Appellate Body for undertaking the same kind of analysis proffered by the Respondent in this case:

> [...] The Panel relies heavily on what it characterizes as "past GATT practice", without undertaking any analysis of the ordinary meaning of the terms of Article II in their context and in the light of the object and purpose of the GATT 1994, in accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*.[66]

106. Moreover it must be recalled that, pursuant to NAFTA Article 1136(1), "an award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." This is not to say that a tribunal should not canvass "the relevant aspects of earlier decisions."[67] But those earlier decisions must be relevant to the case at hand. Portraying excerpts from previous awards out of their original context, as being determinative of a *sui generis* case, is not helpful.

107. The Respondent puts forward unrelated NAFTA cases (such as *Group ADF* at page 14) as being determinative of the meaning of the terms of Article 1102(1); it also cites a handful of unrelated academic articles to portray the issue before this Tribunal as routine when the opposite is true. None of the articles and commentaries cited by the Respondent, particularly those found on pages 9-11 and 16-17, addressed the question before this Tribunal. Most were, in fact, early pieces written about the general nature of the Chapter, and none were written in contemplation of the case at bar.

(3) Applying irrelevant ICSID Jurisprudence

108. On page 10 of its Memorial, the Respondent even goes so far as to argue that an ICSID tribunal has actually ruled on the same issue now before this Tribunal. In doing so,

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[66] Argentina—Safeguard Measures on Imports of *Footwear, Textiles, Apparel, and Other Items* (1998), WTO Doc., WT/DS56/AB/R and Corr. at para. 42.

[67] *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, at para. 107 (16 December 2002).

it neglects to acknowledge that the jurisdiction of a tribunal under Article 25 of the ICSID Convention is based upon a much different set of criteria than a tribunal established under NAFTA Chapter 11.[68] More important, the Respondent mischaracterises both the Claimants' position in this case, and the facts and arguments in *Gruslin v. Malaysia*.[69]

109. In *Gruslin*, the investor was actually attempting to prove how an indirect investment qualified for protection under an investment protection agreement between the *Belgium-Luxemburg Economic Union* and *Malaysia*. In that case, the claimant invested U.S.$2.3 million in a Luxemburg-based mutual fund named "Emerging Asian Markets Equity Citiportfolio." The fund manager invested heavily in the Kuala Lumpur Stock Exchange and half of its value was subsequently lost when Malaysia endured an exchange crisis that necessitated the imposition of controls on the exchange of foreign currency. Because the Agreement did not extend to indirect investments, as do many bilateral investment treaties, the claimant attempted to argue that his interest in a Luxemburg mutual fund actually qualified as an investment in the territory of Malyasia. The Sole Arbitrator ruled that the claimant's investment was not, in fact, in the territory of Malaysia.

110. The *Gruslin* award does not assist the Tribunal with respect to the present case. The Claimant in this case do not claim, as did all of the claimants in all of the cases cited by the Respondent, that they have made an investment in the territory of another Party that is deserving of a traditional form of foreign investment protection like that available under a bilateral investment treaty. The Claimant certainly have not attempted, as did Mr. Gruslin, to argue that a portfolio investment made in one country qualifies under a bilateral investment treaty as an investment in another country. Rather, the Claimants in this case argue that, as investors, they have been denied the most favourable treatment available to investors operating in like circumstances in the Free Trade Area established

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[68] See generally *Suez*, *supra* note 32; *Methanex* and *Grand River*, *supra* note 30.

[69] *Gruslin v. Malaysia*, ICSID Case No. ARB/99/3, Final Award (27 November 2000) [*Gruslin*].

under the NAFTA. The Claimants are relying on an obligation that is particular only to the NAFTA, and that – to the Claimants' knowledge – has no equal in a bilateral investment protection treaty such as the one invoked by *Gruslin*.

(4) Claims of Sovereignty in Interpretation

111. In addition to the forgoing, the Respondent also attempts, at page 4 of its Memorial, to indirectly invoke its sovereignty as a defence to the Claim. It argues that its status as a sovereign is relevant to interpretation of the jurisdiction of a NAFTA Tribunal, saying that the claimants are not entitled to receive "the benefit of the doubt" in terms of the validity of their claim. Such arguments have been made, and dismissed, before. For example, the *Ethyl* Tribunal wrote:

> The Tribunal considers it appropriate first to dispense with any notion that Section B of Chapter 11 is to be construed "strictly." The erstwhile notion that "in case of doubt a limitation of sovereignty must be construed restrictively" has long since been displaced by Article 31 and 32 of the Vienna Convention. As was so aptly stated by the Tribunal in *Amco Asia Corporation v. Indonesia (Jurisdiction)*, ICSID Case No. ARB/81/1 (Award of 25 Sept. 1983), *reprinted in* 23 I.L.M. 351, 359 (1983) and 1 ICSID Rep 389 (1993).[70]

112. Commentators and tribunals alike have concluded in similar contexts that the general rule of interpretation found in VCLT Article 31 represents a distinct move away from a doctrine of strict interpretation of treaty provisions (jurisdictional or otherwise), in deference to State sovereignty.[71] In fact, some investment treaty tribunals have relied heavily on the object and purposes of the specific treaties before them to conclude that it

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[70] *Ethyl*, *supra* note 28 at para. 55.

[71] See e.g. *Aguas del Tunari S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3 at para. 91 (21 October 2005); and Christopher L. Schreuer, "The Interpretation of Treaties by Domestic Courts", (1971) 45 Brit. Y. B. Int'l L. 255 at 283-301.

"... is legitimate to resolve uncertainties in [...] interpretation so as to favor the protection of covered investments."[72]

113. The Claimants do not subscribe to this latter view. Rather, they assert that "there is no principle either of extensive or restrictive interpretation of jurisdictional provisions in treaties."[73] The Respondent wrongly anticipates the Investors' case by implying that they would seek the benefit of the doubt from the Tribunal in its interpretation of NAFTA Chapter 11. With respect, the Claimants do not need the benefit of any doubt. The terms of NAFTA Articles 1101(1)(a) and 1102(1) are clear on their face; they entitle the Claimants to receive treatment no less favourable than that which the United States effectively provides to its own investors operating in like circumstances with the Investors in what was once a thriving, integrated cattle market within the North American Free Trade Area.

(5) Claims of Agreement by the NAFTA Parties

114. On pages 7, 9 and 15, the United States misleads the Tribunal in arguing that all three NAFTA Parties have agreed upon the issue before the Tribunal in the Respondent's favour. The Respondent is well aware that the NAFTA specifically provides a mechanism whereby the three NAFTA Parties could agree upon the interpretation that it proffers for Articles 1101(1) and 1102(1). Under Article 2001(1) a Free Trade Commission is established comprising cabinet-level representatives of the Parties or their designees and under Article 2001(2) the Commission is empowered to oversee the

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[72] *National Grid*, *supra* note 30 at para. 69; citing: Société Générale de Surveillance S.A. (SGS) v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January 2004), 8 ICSID Rep. 518 (2005), para. 116.

[73] *Mondev*, *supra* note 28 at para. 43 footnoted: "Neither the International Court of Justice nor other tribunals in the modern period apply any principle of restrictive interpretation to issues of jurisdiction. For the International Court see e.g., *Fisheries Jurisdiction Case (Spain v. Canada)*, ICJ Reports 1998 p. 432 at pp. 451-2 (paras. 37-38), 452-456 (paras. 44-56); *Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)*, 39 ILM 1116 (2000) at p. 1130 (para. 42). For other tribunals See e.g., *Amco Asia Corporation v. Republic of Indonesia (Jurisdiction)*, (1983) 1 ICSID Reports 389 at p. 394; *Ethyl Corporation v. Canada (Jurisdiction)*, decision of 24 June 1998, (1999) 38 ILM 708 at p. 723 (para. 55)."

"further elaboration" of the Agreement and "resolve disputes that may arise regarding its interpretation or application." Under Article 1131(2), statements of interpretation issued by the Commission are deemed to be binding on a Tribunal established under Section B of Chapter 11. The Commission has not issued a statement in respect of the interpretation of Article 1102(1).

(6) Manufacturing a "Legal Scrub" Exception

115. The Respondent's final argument is found on pages 15-19 of its Memorial. It consists of a brief discussion of the negotiating texts described above, in which the Respondent attempts to downplay the obvious significance of the changes that were made to the treaty text prior to its being finalised. Its primary contention, in this regard, is that the changes were not significant because they were undertaken on the basis of a "legal scrub." There is no basis in international law for the proposition that changes to the treaty text are not significant if they are made by lawyers in the weeks preceding its finalisation rather than by another type of bureaucrat at some earlier date. The legal scrub of a treaty text is obviously an important step in the completion of any treaty performed by competent legal professionals in the employ of each signatory government. The Respondent would apparently have the Tribunal believe that the final changes made to the terms of Articles 1101(1) and 1102(1) were merely the result of some sort of oversight made by persons who were, in fact, likely some of the best lawyers in the Parties' employ.

116. It is far more credible to assert that the ordinary meaning of the final draft, viewed in context and in light of the NAFTA objectives, says what it says.

IV. Conclusion

A. The Respondent's Approach

117. The Respondent has not demonstrated, and cannot demonstrate, how its restrictive interpretation of the NAFTA text comports with a proper interpretation under the applicable rules of interpretation. The interpretation thus proffered is not reflective of modern business realities in the North American context. The terms of the NAFTA – its preamble, purposes and obligations – are reflective of those realities. Enterprises operating in an integrated free trade zone cannot be artificially isolated upon a national or territorial basis. This is why the Government of Canada lost the argument it made before the *S.D. Myers* Tribunal, cited by the Respondent on page 8 of its Memorial, that it was not obliged to pay damages to a successful claimant whose frustrated business enterprise was based in Ohio but targeted customers in Ontario and Québec.

118. The *S.D. Myers* Tribunal rejected the Canadian argument because it did not reflect business reality within the context of that case. The Respondent has similarly proposed a construction of the NAFTA that does not comport with the realities of the North American cattle industry. It seeks to impose a territorial limitation without any textual support, effectively attempting to turn a national treatment case into an expropriation case. The Claimant Investors have not argued that they had investments in the territory of the United States that were taken without compensation as a result of a border ban. Their claim is that the ban unreasonably afforded better treatment to U.S.-based investors than it has to Canadian-based investors operating their investments in the same integrated market.

119. The Respondent is thus faced with a difficult position. It is faced with treaty terms whose ordinary meaning vindicates the Investors' claim, in context and in light of the NAFTA's specific objectives and interpretative principles. It is also faced with negotiating texts that provide stark confirmation of such ordinary meaning. In response, the Respondent has manufactured an alternative set of object and purposes for NAFTA Chapter 11 and attempted to distract the Tribunal from the ordinary meaning of Article

1102(1) by presenting an all-or-nothing view of the Chapter as being nothing more than an investment protection treaty tacked onto the most comprehensive free trade agreement in history.

120. The Respondent does not explain why the terms of Article 1102(1) cannot mean what they say, providing protection from non-discrimination for investors not commonly found in a typical bilateral investment protection treaty. It cites irrelevant cases and commentaries and alleges agreement of the Parties on interpretation of the provision where none exists. It strives to paint the Investors' claims as having been raised and defeated by previous tribunals when, in fact, the case is *sui generis*. In short, the Respondent provides no credible reason as to why the Investors' claims should not proceed to a hearing on the merits.

B. The Claimants' Approach

121. Faithful adherence to the general rule of treaty interpretation, as required under Articles 102(2) and 1131(1), leads one to the inevitable conclusion that the Investors' claim must proceed to the merits. The ordinary meaning of the terms found in NAFTA Article 1102(1) demonstrates how the Investors are entitled to make a claim against the United States under Article 1116 in respect of the measures at issue in this case.

122. The context established by the remainder of the NAFTA text, including Articles 1101, 1103, 1105, 1106, 1110, 1116 and 1138, confirms the ordinary meaning of the Article 1102(1) text. These provisions combine to establish a simple but elegant architecture of protection under the chapter. This architecture ensures that investors receive all of the protections for their cross-border investments that one would expect from a typical investment treaty, while simultaneously providing the added promise of non-discrimination for them when they are competing in like circumstances with investors from other NAFTA Parties in an integrated market fostered by establishment of the Free Trade Area.

123. The objectives and interpretative principles contained in NAFTA Article 102(1), and confirmed by its preamble, only reinforce the ordinary meaning of Article 1102(1), in context. They explain how and why investors participating in similar circumstances with their competitors in the Free Trade Area are entitled to expect that the conditions of fair competition to be promoted by another NAFTA Party, in keeping with the principles of national treatment and transparency. Such an approach realises all of the objectives of the NAFTA, including substantially increasing investment opportunities in the territories of the Parties and facilitating cross-border trade in goods and services generated by investors of all three NAFTA Parties.

124. Collectively, the Investors have dedicated hundreds millions of dollars in property to compete in an integrated, continental market for live cattle that would not have existed but for the promises contained within the NAFTA. The NAFTA invited the Investors to participate in a Free Trade Area with a promise that none of the NAFTA Parties would intervene to favour their investors over those of another. By breaking this promise, the United States has altered the conditions of competition that had existed between the Investors and their U.S.-based competitors. The Investors have suffered grave losses as a result and are entitled, by the terms of Articles 1102(1) and 1116, to seek compensation from the United States for it.

125. For the forgoing reasons, the Claimant Investors hereby request the Tribunal to answer the agreed question in the affirmative and to proceed with the scheduling of a hearing of the merits of this consolidated case.

All of which is respectfully submitted.

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